

PAUL WAGGONER LAW
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August 8, 2019

Clerk of the Appellate Courts
303 K Street
Boney Building 4th Floor
Anchorage, AK 99501

Re: Burnett v. Martinezes v. GEICO
Supreme Court Nos. S-17041 and S-17132

**MARTINEZES' SUPPLEMENTAL AUTHORITY RE
PRECISE RELIEF SOUGHT**

Complicated piecemeal litigation and delay is what GEICO has sought through its obvious violations of the Civil Rules and obvious violations of its insurance duties. The "Relief" granted by the Court should not bring more complicated piecemeal litigation and delay. Simply referring this case to one of those trial courts is not an effective remedy because the very purpose for GEICO's conduct is to create delayed complicated piecemeal litigation.

The specific requested "Relief" sought is that GEICO be ordered to expeditiously contain and cleanup the fuel spill on Mr. Burnett's property to State Standards.

This Relief is consistent with Alaska law AS 46.04.020.

It is also consistent with the representations made by Suzan Amundsen on 12/6/2013 before the Release was executed 3/21/2014. See Exhibit A, Suzan Amundsen's Site Closure Report dated 12/6/2013 which is part of Excerpt 129-150. GEICO is eager to enforce the Release

but does not want to stand behind Suzan's representations contrary to *Continental Ins. Co. v. Bayless and Roberts, Inc.* 608 P.2d 281, 293-4 (Alaska 1980).

An expeditious cleanup is also consistent with the written demands the Martinezes made on GEICO on 12/6/2017 after GEICO notified the Martinezes of the ongoing pollution, at which time Paul Waggoner was authorized by GEICO attorney Mike Hanson and GEICO Claim Manager Mike Lina to continue to work to protect the Martinezes' interests in the litigation. See Exhibit C which is included in Excerpt 220-225. The written demands made on GEICO at Exc. 220 included:

The point of this letter is to notify GEICO that the Martinez want the property properly cleaned up so this case can be fully closed. Nothing but a proper cleanup will do that. GEICO appears to be distracted by the question of duty to Burnett, while GEICO should focus on the duty it owes to the Martinez. The Martinez still have exposure in this case to the State and to innocent third parties. They need to be protected from that exposure and the only way to do that is to clean up the property.

..... Because the spill was not cleaned up for about 2 years, it was much more expensive to clean up, and it still is not cleaned up. The dispute between Burnett and GEICO is about who caused the delay in the cleanup, and thus who caused the increased damages. The delay was not caused by the Martinez, and they should not be responsible for the damages that resulted from the delay in adjustment....., the additional damages caused by the delayed cleanup should not be pushed off (or foisted off as the Supreme Court said) onto the Martinez.

This 12/6/2017 letter is an adequate record on which to grant appellate relief given GEICO's violations of the Civil Rules in the trial courts, and to avoid delayed complicated piecemeal litigation.

GEICO's primary tactic to achieve its goal of delayed complicated piecemeal litigation has been to interfere with the Martinezes' right to independent counsel. See Exhibit C, which is Excerpt 213-236 (this includes a duplication of Exhibit B, but Martinezes have done that for clarity of presentation.) The first two pages of Exhibit C, Exc. 213-214, is a false letter drafted

for Jennifer Montano's signature, probably by her attorney. Although GEICO has grudgingly taken one-half step back from Montano's letter, GEICO has continued to carry out its plan to attempt to deprive the Martinezes of their right to select independent counsel. This case is an extreme example of the vices discussed in *CHI of Alaska Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) because Martinezes' counsel was not even allowed to be present in the Fairbanks courtroom to protect the Martinezes' interests. This interference has continued and intensified while this case is in this Court, resulting in a lawsuit based on false allegation against independent counsel. It is appropriate for the Supreme Court to exercise its authority to prevent this from continuing here and in the trial courts.

The relevant facts which are discussed below are undisputed. In such circumstances an appellant can refine and expand its arguments. *Zeeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985); *O'Neill Investigations v. Illinois Employers Insurance*, 636 P.2d 1170, 1175 n. 7 (Alaska 1981). Harmless procedural violations do not prevent the Court from providing an appropriate remedy. *Howard S. Lease Const. Co. & Assoc. v. Holly*, 725 P.2 712, 719 (Alaska 1986); *Civil Rule 61*. The Court will look at what is really disputed in a case to determine what remedy is appropriate. *Key Pacific Mort., Inc. v. Industrial Indem. Co. of Alaska*, 845 P.2d 1087 n. 2 (Alaska 1993). The Court should apply equitable principles. *Knaebel v. Heiner*, 663 P.2d 551 (Alaska 1983).

The undisputed facts include:

1--It is an undisputed fact and admitted in GEICO's Answers that the fuel spill could have been cleaned up for less than the Martinezes' policy limits. The difficulties in the cleanup allegedly created by Mr. Burnett just represent defense costs that GEICO chose not to incur.

GEICO's failure to take any steps to compel containment and cleanup and incur those defense costs was an abandonment of the Martinezes and a failure to defend.

2--It is an undisputed fact that GEICO violated AS 46.04.020 by failing to immediately contain the fuel spill. It is an undisputed fact that there was no physical containment of the fuel spill for almost two years during which two spring breakups occurred, thawing the ground, spreading the pollution and causing the excess damages.

3--It is an undisputed fact that GEICO violated DEC regulations by interfering with the neutrality or impartiality of Suzan Amundsen. Before that interference occurred, Suzan Amundsen recommended an immediate response to the fuel spill by GEICO, but GEICO failed to take any steps to physically contain or clean up the fuel spill or seek a court order requiring it for more than a year and two breakups.

4--It is undisputed that the fuel spill is not cleaned up to State Standards at this time, contrary to representations made by Suzan Amundsen to the parties and to the State (See Exhibit A) at the time Burnett's claims against the Martinezes were first settled.

5--It is undisputed that Mr. Burnett has stated his intention to report the ongoing contamination to potential buyers of his property, and that a Lis Pendens has been filed giving notice to potential buyers of the property of the continuing contamination.

6--It is undisputed that GEICO has refused to inform the Martinezes of the extent of continuing contamination by producing a report of its retained expert Dave Nyman whose company has inspected the property, and GEICO has also refused to authorize the Martinezes to retain their own expert to evaluate the extent of the contamination.

7--It is an undisputed fact that GEICO has continued to refuse to pay Independent Counsel's bills for work on the case based on the excuse that the work was an appeal or a third

party cross-claim, even though Independent Counsel's work is intertwined with and directed at protecting the Martinezes's from liability for the original fuel spill.

8--It is an undisputed fact that GEICO has interfered with the work of independent counsel by GEICO coverage counsel Kim Colbo forming an attorney client relationship with Jennifer Montano, the GEICO independent adjuster appointed at the request of Paul Waggoner to open a separate file to supervise the work of Paul Waggoner to protect the interests of the Martinezes. This violation has continued to occur while this case has been on appeal.

9--It is undisputed that GEICO sued Paul Waggoner claiming that he negligently settled Burnett's claims against the Martinezes when the settlement offer was in fact prepared by GEICO's attorney Mike Hanson. To further interfere with Waggoner's work as independent counsel for the Martinezes GEICO coupled the suit against Paul Waggoner with threats to disqualify Waggoner. This violation occurred while this case has been on appeal to this Court.

10--There are disputed facts regarding the relative tort duties between Burnett and GEICO which must be resolved by the trier of fact, which is a jury in this case. However, there is no dispute of fact as to GEICO's breach of its insurance duties owed to the Martinezes and there is no dispute of fact that GEICO breached Alaska law intended to contain the contamination, and there is no dispute of fact that Suzan Amundsen represented that the property was cleaned up to state standards before the Release was executed, and there is no dispute of fact that Suzan Amundsen's representation was not true. There is also no dispute of fact that GEICO did not follow Suzan Amundsen's recommendation that very prompt steps be taken to manage the fuel spill, and instead took steps to impair Suzan Amundsen's neutrality or impartiality in managing the cleanup. Any negligence or other actions on the part of Burnett does not excuse GEICO's breach of its insurance duties to its insureds or provide a justification to delay enforcement of

those duties. After GEICO completes the cleanup of Mr. Burnett's property it can bring claims against Mr. Burnett for reimbursement or partial reimbursement if it sees fit to do so. Whether those claims have merit and what defenses exist to those claims are not before the Court. Those claims or potential claims of GEICO against Burnett do not diminish GEICO's duties to the Martinezes.

11. GEICO failed to defend the Martinezes.

12. GEICO failed to give timely notice to the Martinezes and GEICO continues to fail to give notice to the Martinezes of information important to their defense.

Based on the above, the Martinezes request that GEICO be ordered to:

1. Without delay contain and cleanup contamination on Mr. Burnett's property to State Standards; GEICO shall comply with all DEC regulations as it complies with this Order.
2. Stop interfering with the continued work of Paul Waggoner on this case protecting the Martinezes interest on this case. Pay Independent Counsel Paul Waggoner's bills for work related to the Fairbanks trial court, the Petition for Review, the Appeals, and all work in the Anchorage trial court. Payment is required whether GEICO considers the work to be a counterclaim, a cross claim or an appeal. (Bills received from Richmond & Quinn should be paid to Richmond & Quinn and bills received from Paul Waggoner should be paid to Paul Waggoner.)

3. Cease to use Kim Colbo or Jennifer Montano to supervise independent counsel's work or his billing, replace Kim Colbo as coverage counsel and assign new adjusters to this case to replace Jennifer Montano.
4. Produce all of GEICO's files regarding this case. GEICO has waived the attorney client privilege in this case by its conduct that includes the violation of the Martinezes' rights to independent counsel, breach of its fiduciary duties to the Martinezes, and the suit against Paul Waggoner.
5. GEICO is responsible and legally liable for the negligence, actions and inactions of Barry Kell and Aisha Tinker Bray or Suzan Amundsen. GEICO may not use an independent contractor defense. GEICO is vicariously liable for their conduct.
6. Produce a report of Dave Nyman of Restoration Science and Engineering that complies with Civil Rule 26 and produce David Nyman for a deposition taken at GEICO's expense.

7. Authorize the Martinezes' counsel to retain at GEICO's expense a pollution expert similar to David Nyman.

8. Not enforce limits to liability payments to protect of the Martinezes as related to this truck accident and fuel spill. GEICO has waived its policy limits.

The requested relief is more direct than sometimes occurs in the appellate courts, but it is an appropriate remedy for GEICO's actions in preventing the Martinezes from making a record in the trial court. Despite GEICO's rule violations, a record sufficient to avoid unfair surprise

has been created. The requested remedy is consistent with Civil Rule 1 (just, speedy, inexpensive), Appellate Rules 520 and 521, and equitable principles. It is also consistent with *Lloyd's & Inst. Of London Underwriting Companies v. Fulton*, 2 P.3d 1199 (Alaska 2000), *CHI of Alaska Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) and *Continental Ins. Co. v. Bayless and Roberts, Inc.* 608 P.2d 281, 293-4 (Alaska 1980).

PAUL WAGGONER LAW

8/8/19


Paul W. Waggoner
Alaska Bar No. 7705070

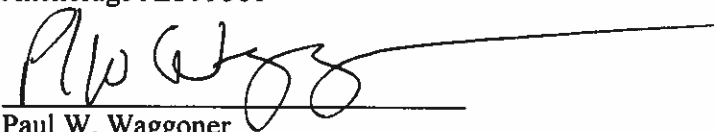
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email August 8, 2019 on:

Kenneth P. Jacobus
310 K Street, Ste. 200
Anchorage, AK 99501

Mike Hanson,
413 G Street,
Anchorage, AK 99501;

Barry Kell
813 W. 3rd Avenue
Anchorage AK 99501


Paul W. Waggoner

Paul W. Waggoner

From: Suzan Amundsen <amundsenenv@live.com>
Sent: Friday, December 13, 2013 12:46 PM
To: Paul W. Waggoner
Cc: spud@gci.net
Subject: RE: spud cleanup
Attachments: Site Closure Report part 1.doc

Part 1 of the Closure Report is attached.

SITE CLOSURE REPORT

3201 Hurst Rd.,
North Pole, Alaska 99705

December 6, 2013



ADEC File # 100.02.155

Prepared for: GEICO, Region IV
Anchorage Claims Office
5701 Lake Otis Parkway, Suite 100
Anchorage, AK 99507

Prepared by: Amundsen Environmental Services
P.O. Box 10726
Fairbanks, Alaska 99710
Suzan Amundsen, B.S., M.S.

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6.0 CONCLUSIONS

The cleanup of hydrocarbon-contaminated soils resulting from a truck accident on a cabin at 3201 Hurst Road, North Pole, Alaska and a subsequent heating fuel release to the property, has been accomplished. The soils were successfully remediated to below ADEC Level A Cleanup Standards at OIT, Inc. A Certificate of Thermal Treatment and final laboratory results from Alaska Analytical Laboratory are found in Appendix E. All accessible soils were removed. Hydrocarbons have likely migrated into the adjacent septic leach field long ago but are not readily accessible. Any other residual contamination from the spill event is deemed minimal and has low potential for migration to groundwater or surface water and poses no threat to human health, safety, welfare and the environment.

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KENNETH M. GUTSCH
JOHN W. HOLLIS
REBECCA A. LINDEMANN
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December 6, 2017

Michael J. Hanson
Call & Hanson, PC
413 G Street
Anchorage, AK 99501

Michael Lina
GEICO
4341 B Street, Suite 204
Anchorage, AK 99503

RE: Charles Burnett v. The Martinez and GEICO

Dear Mike and Mike:

Thank you for approving my continued work on this case protecting the Martinez interests.

The point of this letter is to notify GEICO that the Martinez want the property properly cleaned up so this case can be fully closed. Nothing but a proper cleanup will do that. GEICO appears to be distracted by the question of duty to Burnett, while GEICO should focus on the duty it owes to the Martinez. The Martinez still have exposure in this case to the State and to innocent third parties. They need to be protected from that exposure and the only way to do that is to clean up the property.

Burnett and GEICO continue to litigate over the heating oil fuel spill that occurred as a result of a car accident involving Josh Martinez on November 23, 2011. This was a minor spill that should have been cleaned up rapidly, and would easily have been fully covered by Josh's property liability coverage with GEICO. Because the spill was not cleaned up for about 2 years, it was much more expensive to clean up, and it still is not cleaned up. The dispute between Burnett and GEICO is about who caused the delay in the cleanup, and thus who caused the increased damages. The delay was not caused by the Martinez, and they should not be responsible for the damages that resulted from the delay in adjustment. If it was caused by Burnett, then GEICO should defend the Martinez against the damages caused by Burnett. If it was caused by GEICO, then GEICO should be directly responsible. Either way, the additional damages caused by the delayed cleanup should not be pushed off (or foisted off as the Supreme Court said) onto the Martinez.

GEICO had the right and duty to control this claim from the very start. GEICO's responsibility goes with GEICO's control. Insurers and petroleum distributors know that

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an immediate response after a spill is necessary. That did not occur in this case and that is what the Burnett/GEICO litigation is about. The car accident itself is just a side issue.

It has been suggested that GEICO intends to file a motion asserting that it had no "duty" to Burnett. This has the appearance that GEICO is indirectly asserting that the Martinez may not be protected from the excess costs of the cleanup. I suggest that the proposed motion will not be successful, but more than that, the Martinez expect GEICO to protect them from any additional costs of the cleanup. GEICO asserting that it does not have any duty to Burnett fails to recognize that GEICO does have a duty to the Martinez. The Supreme Court dissent states in the first paragraph that "The plaintiff's allegations taken as true, simply show an insurer acting—reasonably or otherwise—in the course of its contractual duty to minimize its insured's exposure to liability." Whether GEICO took the necessary steps to minimize damages is the issue that is being litigated.

One way to look at the *Burnett v. GEICO* appellate decision is that it is an argument over whether procedurally the Martinez should be the plaintiffs rather than Burnett. It is a procedural question of who should bring the suit against GEICO, rather than how GEICO should have managed the cleanup. GEICO should not allow this procedural question to cloud its analysis of the proper management of the cleanup.

It is easy for GEICO to focus its frustration in this case on Spud Burnett, or his attorney Ken Jacobus. However, the cat is out of the bag at this point because both sides agree that the spill has not been cleaned up. Spud and Ken have little to do with making sure that the property is cleaned. Both Burnett's expert and GEICO's expert have confirmed that the cleanup is not complete. The State has the right to require further cleanup. If GEICO paid Spud and Ken money to settle the case and did not complete the cleanup, that does nothing to the State's claim or an innocent third party's claim against GEICO and against the Martinez. GEICO should not be distracted by frustration with Burnett.

I think there may be a duty to inform the State that the information previously submitted to the State was incomplete and inaccurate. In addition, an innocent third party that purchases the property from Burnett and subsequently discovers the pollution may have a claim against the Martinez and GEICO. This leaves the Martinez and GEICO with exposure no matter what Burnett does, and no matter what duty is owed to Burnett. The only thing that ends the exposure of the Martinez, and of GEICO, is that the property is properly cleaned up. In addition, keeping quiet about continuing pollution while knowing that misinformation has been provided to the State invites a future fraud claim against GEICO.

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Exc. 221

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GEICO made bad law for itself in the last appeal of this matter. It is likely to make more bad law for itself, if it proceeds with its current plans to focus on the duty owed Burnett. That is an interesting academic question of some consequence, but the most important question is what duty GEICO owes to the Martinez given that the State still has a potential claim against them.

Judge McConahy has been reversed once already for granting GEICO summary judgment, and he is likely to be reversed again if he grants GEICO summary judgment again. (See below.) We will be two more years down the road after the second appeal, and the cleanup still will not be completed. What Judge McConahy said the first time was not definitive, and what he says a second time will not be definitive either. Waiting for Judge McConahy to say something that does not matter is not a good plan.

"Duty" is not a defense against the Martinez at all, and is not likely to avoid a jury trial against Burnett. GEICO is misreading *Burnett v. GEICO* in assuming that the Judge decides all duty issues when there is a disputed issue of fact. Below are some quotes with emphasis added from the Supreme Court opinion in this case. In Footnote 16 of *Burnett v. GEICO* the Court said:

16. The existence of a duty is a question of law, but we must examine a case's factual context to determine whether a duty exists. *Hurn v. Greenway*, 293 P.3d 480, 483 (Alaska 2013) ("When determining the existence of a duty of care, summary judgment is appropriate where 'the only reasonable inference from the undisputed facts is that one party owed another no duty whatsoever—or owed a duty clearly and vastly narrower in scope than the one that the other party asserts.'" (quoting *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199, 1203 (Alaska 1998))); see also, e.g., *Williams v. Municipality of Anchorage*, 633 P.2d 248, 251–52 (Alaska 1981) (reversing grant of summary judgment because there was a genuine issue of fact concerning whether a duty was undertaken when municipal employee supplied ladder, installed it, and instructed injured party on its use).

The *Williams v. MOA*, 633 P.2d 248, 251 (AK 1981), case is most directly on point and rejects summary judgment on duty saying:

The municipality is correct in its contention that it had no statutory duty to provide a ladder for the use of the M/V Kirt Chouest. *Shannon v. City of Anchorage*, 429 P.2d 17, 18 (Alaska 1967). However, having undertaken to provide a ladder, it was under a duty to exercise some degree of care for the safety of those using the same. "It is ancient learning that one who assumes

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to act, even though gratuitously, may thereby become subject to the duty of acting carefully” *Adams v. State*, 555 P.2d 235, 240 (Alaska 1976), quoting *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922). The precise nature and extent of that duty, while a question of law, depends upon the nature and extent of the act undertaken, a question of fact. See *Restatement (Second) of Torts ss 321-324 A. (1965)*.... For these reasons we hold that the superior court erred in granting the municipality’s motion for summary judgment.

In Footnote 25 of *GEICO v. Burnett* the Court said:

We note that the dissent misapprehends the posture of this case and misapplies summary judgment rules. The superior court granted summary judgment in favor of GEICO on the theory that GEICO could owe Burnett no duty whatsoever as a third party liability insurer. The dissent agrees that an insurer may undertake an independent duty to a third party claimant while adjusting a claim; thus it appears the entire court agrees that the superior court’s ruling was overbroad, because GEICO could have accepted a new and independent duty to Burnett during the adjustment process. The question then becomes whether GEICO did so. For purposes of defeating GEICO’s summary judgment motion, all Burnett had to show was some admissible evidence leading a reasonable person to conclude there was a dispute on that point. *Christensen*, 335 P.3d at 520. The dissent’s contention that “there is nothing in this case on which to find that such a duty was ever assumed” improperly views the facts in the light most favorable to GEICO rather than to Burnett. Cf. *id.* And contrary to the dissent’s position that we should simply decide the entire case on the present record, Burnett is not required to prove his case at the summary judgment stage. *Id.* Having demonstrated a factual dispute underlying the duty question that was sufficient to defeat summary judgment, Burnett will be required to prove his case at trial.

Footnote 25 points out that both the majority and the dissent agree that GEICO could assume a duty during the adjusting process. However, they disagreed on the standard in Alaska for defeating summary judgment. To some extent, *Burnett v. GEICO* is simply about the standard for determining whether there is a disputed question of fact precluding summary judgment.

GEICO’s argument that questions involving duty are decided as a matter of law by the judge is overstated to the extent that there are disputed questions of fact, but it also makes any decision by Judge McConahy inconsequential because questions of law are

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reviewed de novo on appeal. What McConahy decides means nothing to the Supreme Court as to questions of law.

There are bad facts in this case because the cleanup was not started for about two years after the spill. The Burnett appeal primarily involves an argument about whether Spud is the right party to assert the duty to minimize the Martinez' liability, i.e. properly manage the cleanup. Ultimately, if the Martinez are sued by the State or an innocent third party the Martinez will be making the same arguments (and others) against GEICO that Burnett is currently making against GEICO. At that future time, the Martinez would have to make claims against both GEICO and Burnett over the cleanup management.

An issue in the background is policy limits. GEICO cannot keep quiet about asserting a policy limits defense against the Martinez and wait until it sees which way the wind is blowing. Is the duty to Burnett simply being used to raise a policy limits defense without properly notifying the Martinez?

There probably are some things GEICO can do to protect itself and to protect the Martinez. These are thoughts rather than carefully studied options. However, if GEICO decides to go ahead with completing the cleanup, it should consider filing a counterclaim against Burnett for interfering with the cleanup and enhancing damages. He is not judgment proof because the property has some value. In addition, GEICO should involve the State. The State is the only one who can give a meaningful approval of the property cleanup. I do not think relying on an approval from the State based on misinformation supplied by the contractor hired by GEICO is wise. When the State is notified of the needed cleanup, the State should file a notice of pollution with the land records department. If the State does not file anything, it might be appropriate to file a lis pendens with the land records office. It is necessary that some filing be made to prevent there from being an innocent third party who purchases from Burnett without notice of the pollution. A notice in the land records office would give Burnett an incentive to be more reasonable and get the cleanup over so he can sell the property. GEICO could file a motion with the court to appoint a special master to control the cleanup. If Burnett interferes with current cleanup efforts, it just provides more evidence of Burnett's bad faith.

The Martinez are primarily concerned about the cost of the cleanup. That is what they still have exposure for. They do not have exposure for Burnett's bodily injury claims. GEICO may want to analyze what kind of damages Burnett is asserting, and treat clean up damages differently from bodily injury damages. The continuing duty to the Martinez only involves the cleanup.

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Exc. 224

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I would be glad to discuss these ideas further if I can be of help. The important thing is to protect the Martinez.

This case has some unique aspects to it. I raise this point because sometimes adjusting rules and practices are based on a "one size fits all mentality." One unique aspect is the tremendous increase in damages caused by delay in fuel spill cases. A second is the inability of getting a release from the State. A third is the need to go on private property to protect the public interest in containing the pollution. A hypothetical example would be what if this spill had been much larger and been going into the river. What if Josh Burnett had caused a double tanker to go off the road and into a creek? The Martinez could expect GEICO to be prepared to deal with such circumstances. The Martinez are frustrated with Burnett just like GEICO, but GEICO had control of the adjustment and it is GEICO's business to deal with claimants such as Burnett. GEICO needs to establish a good protocol before the next spill occurs. The insurance industry as a whole should establish special protocols to deal with this kind of situation. Waiting two years to begin a fuel spill cleanup is not going to be found to be acceptable. One size does not fit all.

Sincerely,

RICHMOND & QUINN


Paul W. Waggoner

PWW/art

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Exc. 225

FB-6



GEICO General Insurance Company

Attn: Region IV Claims, PO Box 509119
San Diego, CA 92150-9914

03/08/2018

Richmond And Quinn Apc
Mr. Paul Waggoner
360 K St STE 200
Anchorage, AK 99501-2038

Company Name:	Geico General Insurance Company
Claim Number:	022547967-0101-141
Loss Date:	Wednesday, November 23, 2011
Policyholder:	Robert Martinez
Driver:	Joshua Martinez

Dear Mr. Paul Waggoner,

The following is a response to your various emails dated January 11, 2018, February 5, 2018, and March 1, 2018. As you are aware, to satisfy its duty to defend the Martinez', GEICO appointed you to represent the Martinez' in the pending lawsuit on or about July 11, 2013, and agreed to pay your fees as appointed counsel. Your work as appointed counsel for the Martinez' concluded with the settlement that resulted in their release and dismissal with prejudice from the lawsuit filed by Mr. Burnett. GEICO is writing to specifically advise you that you are not authorized to perform any further legal services for the Martinez' at GEICO's expense.

As you know, there are no current pending claims that have been asserted against the Martinez'. Your efforts all seem to be directed toward addressing future potential theoretical claims that may never be made against the Martinez'. Further, your demand that GEICO agree, in the absence of any actual pending claim, to pay funds on behalf of the Martinez' beyond the policy limits that have already been exhausted is not supported by any Alaska statute or Alaska Supreme Court decision. GEICO advised the Martinez' from the outset of this matter that given the policy limits, and given the environmental claim, there was a potential that the damages could exceed the policy limits. In 2014, the Alaska DEC advised that the clean-up was accomplished to its expectations and that no further remedial work was required. GEICO then paid the policy limits to the only person who had asserted an actual claim against the Martinez' and obtained a complete release of those claims against them. In short, GEICO has satisfied every duty it owed to the Martinez' by defending them while they were parties in Case No. 4FA-12-02365CI and by paying the available policy limits (both bodily injury liability and property damage) to obtain a complete release of the

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Martinez' from claims asserted by Mr. Burnett in connection with the November 23, 2011 accident.

Your authorization to represent the Martinez' at GEICO's expense as their appointed counsel ended when they were dismissed from the lawsuit with prejudice in 2014. You have not been retained by GEICO to provide any further representation to the Martinez'. If they wish to retain you to represent them as their personal counsel, they are free to do so, but GEICO will not be paying your fees for any further work you may do on their behalf. If any claims are filed against the Martinez' in the future by some person or entity other than Mr. Burnett, GEICO will evaluate whether it owes a duty to defend them under the policy at that time. At this time, given that there are no actual pending claims against the Martinez', GEICO owes no duty to defend them.

GEICO set up the split file number 0225479670101141 at your request, on 01/05/2018. On 02/02/2018, you were advised that a review of the entire file was ongoing and no authorization for any work was given to you pending that review. Also, on 02/01/2018 you were advised, in writing, that the file was under review. Given that GEICO did not authorize you to perform any work as appointed counsel for the Martinez' after March, 2014, please advise what legal authority you believe authorized you to continue to perform work on behalf of the Martinez' at GEICO's expense after March 2014? We are unaware of any, but will certainly consider any legal authority you might submit. In the interim, with respect to Invoice #362967 submitted by your firm to GEICO for payment, in the absence of such legal authority, GEICO will not be paying that invoice. Nor will GEICO pay any further fees in connection with your ongoing representation of the Martinez'. The charges for any work that you have performed that was authorized by the Martinez' over the last few months is a matter between you and your clients.

Finally, your correspondence to GEICO dated March 1, 2018 reflects your opinion of the Court and viewpoints on the Judge that in no way reflect GEICO's viewpoints. GEICO feels that your comments are inaccurate, inappropriate and we are specifically troubled by your negative comments regarding Judge McConahy.

By cross-copy of this letter, GEICO is advising the Martinez' of the above and specifically requests that if any entity or person actually files a claim against them in the future related to the November 23, 2011 accident, that they promptly submit any such claim to GEICO so that it can evaluate whether it owes a duty to defend them against such claims.

Please let us know if you have any questions about the above. Thank you.

Sincerely,

Jennifer Montano
907-561-8100 x11
Claims Department

For your protection Alaska law requires the following statement to appear on this form: "A person who knowingly and with intent to injure, defraud, or deceive an insurance company files a claim containing false, incomplete, or misleading information may be prosecuted under state law."

cc: Mr. Robert Martinez
Mr. Joshua Martinez

LAW OFFICES
Richmond & Quinn
A PROFESSIONAL CORPORATION

KENNETH M. GUTSCH
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ROBERT L. RICHMOND
PAUL W. WAGGONER
MARC G. WILHELM

e-mail: pwaggoner@richmondquinn.com
www.richmondquinn.com

March 8, 2018

Jennifer Montano
GEICO-Anchorage Office
4341 B Sreet, Suite 204
Anchorage, AK 99503

Re: Burnett v. Martinez, et al
Case No.: 4FA-12-02365
Claim No.: 0225479670101141
DOL: 11/23/11
Our File No.: 2353.005

Dear Ms. Montano:

My response to the 2018-03-08 letter to me is that Geico is a great company that is getting very bad advice. I hope someone reviews this file and straightens it out. After it is all over I think Geico will realize that I am its best friend, because I am sure Geico does not want to mistreat the Martinez and does want me as independent counsel to fully and fairly represent them, which is what I am doing.

Whoever drafted the letter for your signature is not paying attention or is exercising bad judgment. The assertion that my work was unauthorized is ridiculous. Page 1 of the Geico Defense Authorization attachment is the transmittal email of my December 6, 2017, letter to Mike Hanson and Mike Lina, which is attached beginning at Page 2. The first sentence of that letter states, "Thank you for approving my continued work on this case protecting the Martinez interests." I had verbal discussions with both Mike Hanson and Mike Lina, as well as sending the December 6, 2017, written confirmation. In contemporaneous conversations Mike Lina agreed to raise my billing rate to match Mike Hanson's billing rate. It was clearly understood that I would be charging for my time. It was also clearly understood that I would be doing substantial work. On Page 8 of the attachment is Mike Hanson's email to Aisha Bray requesting that she return her original file to me so that I could review it and use it. On Page 9 are copies of emails reflecting my plan to review all pleadings that had been filed since Burnett's claim against the Martinez was dismissed. Of course I was going review the pleadings

F

C - 3

000832
Exc. 215

JENNIFER MONTANO

March 8, 2018

Page 2

and act on them. Beginning at Page 10 is Geico's Invoice Recap where it paid all but \$144 of a \$4,680 bill that I submitted. Accordingly, the expectation of billing was fulfilled by payment. Whoever drafted your letter is not being credible and should have signed it himself.

Page 14 is a copy of your letter where Geico established a separate file because of the conflict of interest between Geico and the Martinez. Page 15 is a copy of AS 21.96.100 concerning appointment of independent counsel. This follows *CHI of Alaska, Inc. v. Emp'rs Reinsurance Corp.*, 844 P.2d 1113, 1115 (Alaska 1993), which is also applicable. Geico was aware that there was a conflict of interest between the Martinez and Geico, and properly followed independent counsel procedures. As independent counsel, I have limited supervision from Geico.

It is not surprising that Geico would not agree with every position that the Martinez and I take in the case to protect the Martinez interests. I do not accept all the assertions in the 2018-03-08 letter, and am not required to do so since I am independent counsel. Further, it is not a new issue that I have been critical of not taking steps to clean up the fuel oil spill for almost 2 years.

The Martinez dispute that Geico paid their policy limits caused by the accident. The money that Geico paid was largely the result of the two year delay in beginning the cleanup, not the accident. The Martinez still have money available on their policy.

There is currently a claim against the Martinez as stated by Burnett's attorney. In Burnett's Burnett's OPPOSITION TO GEICO'S MOTION TO RESTRICT THE PARTICIPATION OF THE MARTINEZ DEFENDANTS IN THE CASE AND JOINDER IN THE OPPOSITION OF THE MARTINEZ DEFENDANTS dated 2/10/18, it is stated "The cleanup is the joint responsibility of Geico and the Martinez defendants." The same statement is made in Burnett's NONOPPOSITION TO MOTION TO INTERVENE AND TO FILE SUPPLEMENTAL MEMORANDUM dated 2/23/18. The Martinez expect to win on Burnett's claims, but that is not the standard by which the duty to defend is judged.

The Martinez do not agree that there is no claim by the State. This is reflected by the Lis Pendens filed by the Martinez that the trial court has authorized, and which Geico did not oppose. It is the Martinez' position that the State is a necessary party and will be joined to this case. It seems like Geico's tactic in telling its expert not to prepare a report is a discovery violation, and it is obligated to notify Burnett, the court, and the State of

JENNIFER MONTANO

March 8, 2018

Page 3

the inaccurate reports of Suzan Amundsen. Civil Rule 26(e). Geico cannot use its own violation of the discovery rules to undermine its duty to defend the Martinez.

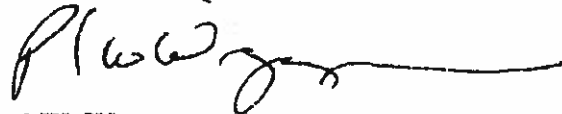
Geico has so far avoided and delayed addressing the crucial issues in this suit. I suppose some people might think that is good lawyering from a litigation perspective. I don't think so, but I am more concerned with whether it is good lawyering from an insurance perspective. I do not think keeping information from an insured is acceptable.

Looking at the long view, I think Geico is very lucky that I have been representing the Martinez. This sounds arrogant, but I have been told that by Geico's own representatives, and complimented on the defense of the Martinez. After others allowed the fuel oil to seep and spread for two years I took over and got it cleaned up as well as possible given the elapse of time. It is much better to address the situation promptly rather than to keep quiet about it and hope it goes away. That is why the Martinez expect to be proactive.

I have told the Martinez that I will not try to collect fees from them. This is not going to go away until the property is cleaned up. I will continue to bill Geico even if Geico won't pay. I want to remind you of the last sentence of AS 21.96.100(c), and the application of the Uniform Arbitration Act to independent counsel fee disputes.

Very truly yours,

RICHMOND & QUINN



Paul W. Waggoner

PWW:jf-w

Enclosures

2353.005/Corr/Montano

C-5

000834
Exc. 217

Geico Defense Authorization

C-6

000835
Exc. 218

Paul W. Waggoner

From: Anita R. Tardugno
Sent: Wednesday, December 06, 2017 1:26 PM
To: mjh@chklaw.net; mlina@geico.com
Cc: Paul W. Waggoner
Subject: Burnett v. Martinez & Geico
Attachments: 2017-12-06 HANSON & LINA 01.pdf

Please see the attached letter from Paul Waggoner. A hard copy is also to follow by mail.

Anita R. Tardugno, PLS
Legal Assistant

Richmond & Quinn | 360 K Street, Suite 200 | Anchorage, AK 99501
☎ 907-276-5727 | 📠 907-276-2953 | ✉ atardugno@richmondquinn.com

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LAW OFFICES
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ROBERT L. RICHMOND
PAUL W. WAGGONER
MARC G. WILHELM

e-mail: pwaggoner@richmondquinn.com
www.richmondquinn.com

December 6, 2017

Michael J. Hanson
Call & Hanson, PC
413 G Street
Anchorage, AK 99501

Michael Lina
GEICO
4341 B Street, Suite 204
Anchorage, AK 99503

RE: Charles Burnett v. The Martinez and GEICO

Dear Mike and Mike:

Thank you for approving my continued work on this case protecting the Martinez interests.

The point of this letter is to notify GEICO that the Martinez want the property properly cleaned up so this case can be fully closed. Nothing but a proper cleanup will do that. GEICO appears to be distracted by the question of duty to Burnett, while GEICO should focus on the duty it owes to the Martinez. The Martinez still have exposure in this case to the State and to innocent third parties. They need to be protected from that exposure and the only way to do that is to clean up the property.

Burnett and GEICO continue to litigate over the heating oil fuel spill that occurred as a result of a car accident involving Josh Martinez on November 23, 2011. This was a minor spill that should have been cleaned up rapidly, and would easily have been fully covered by Josh's property liability coverage with GEICO. Because the spill was not cleaned up for about 2 years, it was much more expensive to clean up, and it still is not cleaned up. The dispute between Burnett and GEICO is about who caused the delay in the cleanup, and thus who caused the increased damages. The delay was not caused by the Martinez, and they should not be responsible for the damages that resulted from the delay in adjustment. If it was caused by Burnett, then GEICO should defend the Martinez against the damages caused by Burnett. If it was caused by GEICO, then GEICO should be directly responsible. Either way, the additional damages caused by the delayed cleanup should not be pushed off (or foisted off as the Supreme Court said) onto the Martinez.

GEICO had the right and duty to control this claim from the very start. GEICO's responsibility goes with GEICO's control. Insurers and petroleum distributors know that

Michael J. Hanson
Michael Lina
December 6, 2017
Page 2

an immediate response after a spill is necessary. That did not occur in this case and that is what the Burnett/GEICO litigation is about. The car accident itself is just a side issue.

It has been suggested that GEICO intends to file a motion asserting that it had no "duty" to Burnett. This has the appearance that GEICO is indirectly asserting that the Martinez may not be protected from the excess costs of the cleanup. I suggest that the proposed motion will not be successful, but more than that, the Martinez expect GEICO to protect them from any additional costs of the cleanup. GEICO asserting that it does not have any duty to Burnett fails to recognize that GEICO does have a duty to the Martinez. The Supreme Court dissent states in the first paragraph that "The plaintiff's allegations taken as true, simply show an insurer acting—reasonably or otherwise—in the course of its contractual duty to minimize its insured's exposure to liability." Whether GEICO took the necessary steps to minimize damages is the issue that is being litigated.

One way to look at the *Burnett v. GEICO* appellate decision is that it is an argument over whether procedurally the Martinez should be the plaintiffs rather than Burnett. It is a procedural question of who should bring the suit against GEICO, rather than how GEICO should have managed the cleanup. GEICO should not allow this procedural question to cloud its analysis of the proper management of the cleanup.

It is easy for GEICO to focus its frustration in this case on Spud Burnett, or his attorney Ken Jacobus. However, the cat is out of the bag at this point because both sides agree that the spill has not been cleaned up. Spud and Ken have little to do with making sure that the property is cleaned. Both Burnett's expert and GEICO's expert have confirmed that the cleanup is not complete. The State has the right to require further cleanup. If GEICO paid Spud and Ken money to settle the case and did not complete the cleanup, that does nothing to the State's claim or an innocent third party's claim against GEICO and against the Martinez. GEICO should not be distracted by frustration with Burnett.

I think there may be a duty to inform the State that the information previously submitted to the State was incomplete and inaccurate. In addition, an innocent third party that purchases the property from Burnett and subsequently discovers the pollution may have a claim against the Martinez and GEICO. This leaves the Martinez and GEICO with exposure no matter what Burnett does, and no matter what duty is owed to Burnett. The only thing that ends the exposure of the Martinez, and of GEICO, is that the property is properly cleaned up. In addition, keeping quiet about continuing pollution while knowing that misinformation has been provided to the State invites a future fraud claim against GEICO.

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Michael J. Hanson
Michael Lina
December 6, 2017
Page 3

GEICO made bad law for itself in the last appeal of this matter. It is likely to make more bad law for itself, if it proceeds with its current plans to focus on the duty owed Burnett. That is an interesting academic question of some consequence, but the most important question is what duty GEICO owes to the Martinez given that the State still has a potential claim against them.

Judge McConahy has been reversed once already for granting GEICO summary judgment, and he is likely to be reversed again if he grants GEICO summary judgment again. (See below.) We will be two more years down the road after the second appeal, and the cleanup still will not be completed. What Judge McConahy said the first time was not definitive, and what he says a second time will not be definitive either. Waiting for Judge McConahy to say something that does not matter is not a good plan.

"Duty" is not a defense against the Martinez at all, and is not likely to avoid a jury trial against Burnett. GEICO is misreading *Burnett v. GEICO* in assuming that the Judge decides all duty issues when there is a disputed issue of fact. Below are some quotes with emphasis added from the Supreme Court opinion in this case. In Footnote 16 of *Burnett v. GEICO* the Court said:

16. The existence of a duty is a question of law, but we must examine a case's factual context to determine whether a duty exists. *Hurn v. Greenway*, 293 P.3d 480, 483 (Alaska 2013) ("When determining the existence of a duty of care, summary judgment is appropriate where 'the only reasonable inference from the undisputed facts is that one party owed another no duty whatsoever—or owed a duty clearly and vastly narrower in scope than the one that the other party asserts.'" (quoting *Arctic Tug & Barge, Inc. v. Raleigh, Schwarz & Powell*, 956 P.2d 1199, 1203 (Alaska 1998))); see also, e.g., *Williams v. Municipality of Anchorage*, 633 P.2d 248, 251–52 (Alaska 1981) (reversing grant of summary judgment because there was a genuine issue of fact concerning whether a duty was undertaken when municipal employee supplied ladder, installed it, and instructed injured party on its use).

The *Williams v. MOA*, 633 P.2d 248, 251 (AK 1981), case is most directly on point and rejects summary judgment on duty saying:

The municipality is correct in its contention that it had no statutory duty to provide a ladder for the use of the M/V Kirt Chouest. *Shannon v. City of Anchorage*, 429 P.2d 17, 18 (Alaska 1967). However, having undertaken to provide a ladder, it was under a duty to exercise some degree of care for the safety of those using the same. "It is ancient learning that one who assumes

Michael J. Hanson
Michael Lina
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Page 4

to act, even though gratuitously, may thereby become subject to the duty of acting carefully" *Adams v. State*, 555 P.2d 235, 240 (Alaska 1976), quoting *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922). The precise nature and extent of that duty, while a question of law, depends upon the nature and extent of the act undertaken, a question of fact. See *Restatement (Second) of Torts ss 321-324 A. (1965)*.... For these reasons we hold that the superior court erred in granting the municipality's motion for summary judgment.

In Footnote 25 of *GEICO v. Burnett* the Court said:

We note that the dissent misapprehends the posture of this case and misapplies summary judgment rules. The superior court granted summary judgment in favor of GEICO on the theory that GEICO could owe Burnett no duty whatsoever as a third party liability insurer. The dissent agrees that an insurer may undertake an independent duty to a third party claimant while adjusting a claim; thus it appears the entire court agrees that the superior court's ruling was overbroad, because GEICO could have accepted a new and independent duty to Burnett during the adjustment process. The question then becomes whether GEICO did so. For purposes of defeating GEICO's summary judgment motion, all Burnett had to show was some admissible evidence leading a reasonable person to conclude there was a dispute on that point. *Christensen*, 335 P.3d at 520. The dissent's contention that "there is nothing in this case on which to find that such a duty was ever assumed" improperly views the facts in the light most favorable to GEICO rather than to Burnett. Cf. *id.* And contrary to the dissent's position that we should simply decide the entire case on the present record, Burnett is not required to prove his case at the summary judgment stage. *Id.* Having demonstrated a factual dispute underlying the duty question that was sufficient to defeat summary judgment, Burnett will be required to prove his case at trial.

Footnote 25 points out that both the majority and the dissent agree that GEICO could assume a duty during the adjusting process. However, they disagreed on the standard in Alaska for defeating summary judgment. To some extent, *Burnett v. GEICO* is simply about the standard for determining whether there is a disputed question of fact precluding summary judgment.

GEICO's argument that questions involving duty are decided as a matter of law by the judge is overstated to the extent that there are disputed questions of fact, but it also makes any decision by Judge McConahy inconsequential because questions of law are

Michael J. Hanson
Michael Lina
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Page 5

reviewed de novo on appeal. What McConahy decides means nothing to the Supreme Court as to questions of law.

There are bad facts in this case because the cleanup was not started for about two years after the spill. The Burnett appeal primarily involves an argument about whether Spud is the right party to assert the duty to minimize the Martinez' liability, i.e. properly manage the cleanup. Ultimately, if the Martinez are sued by the State or an innocent third party the Martinez will be making the same arguments (and others) against GEICO that Burnett is currently making against GEICO. At that future time, the Martinez would have to make claims against both GEICO and Burnett over the cleanup management.

An issue in the background is policy limits. GEICO cannot keep quiet about asserting a policy limits defense against the Martinez and wait until it sees which way the wind is blowing. Is the duty to Burnett simply being used to raise a policy limits defense without properly notifying the Martinez?

There probably are some things GEICO can do to protect itself and to protect the Martinez. These are thoughts rather than carefully studied options. However, if GEICO decides to go ahead with completing the cleanup, it should consider filing a counterclaim against Burnett for interfering with the cleanup and enhancing damages. He is not judgment proof because the property has some value. In addition, GEICO should involve the State. The State is the only one who can give a meaningful approval of the property cleanup. I do not think relying on an approval from the State based on misinformation supplied by the contractor hired by GEICO is wise. When the State is notified of the needed cleanup, the State should file a notice of pollution with the land records department. If the State does not file anything, it might be appropriate to file a lis pendens with the land records office. It is necessary that some filing be made to prevent there from being an innocent third party who purchases from Burnett without notice of the pollution. A notice in the land records office would give Burnett an incentive to be more reasonable and get the cleanup over so he can sell the property. GEICO could file a motion with the court to appoint a special master to control the cleanup. If Burnett interferes with current cleanup efforts, it just provides more evidence of Burnett's bad faith.

The Martinez are primarily concerned about the cost of the cleanup. That is what they still have exposure for. They do not have exposure for Burnett's bodily injury claims. GEICO may want to analyze what kind of damages Burnett is asserting, and treat clean up damages differently from bodily injury damages. The continuing duty to the Martinez only involves the cleanup.

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C-12


Michael J. Hanson
Michael Lina
December 6, 2017
Page 6

I would be glad to discuss these ideas further if I can be of help. The important thing is to protect the Martinez.

This case has some unique aspects to it. I raise this point because sometimes adjusting rules and practices are based on a "one size fits all mentality." One unique aspect is the tremendous increase in damages caused by delay in fuel spill cases. A second is the inability of getting a release from the State. A third is the need to go on private property to protect the public interest in containing the pollution. A hypothetical example would be what if this spill had been much larger and been going into the river. What if Josh Burnett had caused a double tanker to go off the road and into a creek? The Martinez could expect GEICO to be prepared to deal with such circumstances. The Martinez are frustrated with Burnett just like GEICO, but GEICO had control of the adjustment and it is GEICO's business to deal with claimants such as Burnett. GEICO needs to establish a good protocol before the next spill occurs. The insurance industry as a whole should establish special protocols to deal with this kind of situation. Waiting two years to begin a fuel spill cleanup is not going to be found to be acceptable. One size does not fit all.

Sincerely,

RICHMOND & QUINN



Paul W. Waggoner

PWW/art

I:\2153\005\CORR\HANSON & LINA 01.docx

7

000842
Exc. 225

C-13

Paul W. Waggoner

From: Mike J. Hanson <MikeJHanson@chklaw.net>
Sent: Tuesday, December 19, 2017 3:23 PM
To: Bray, Aisha T (LAW)
Cc: Paul W. Waggoner
Subject: Burnett v. GEICO--Documents sent to you.

Aisha, Apparently the documents sent to you on the Martinez file were originals from Paul Waggoner's file. He is back involved to watch over whether the State makes a claim against the Martinez's for additional pollution on the property, and he needs the documents back. When he originally sent them to me, he asked for me not to look at them and send them directly to you, which I did, so I do not have a copy. What is the best method to get the documents back to Paul and you retain a copy? If you copy them, GEICO will pay for the copying charges, and it should be billed through Paul's office; or you can send them back to Paul and he will send you a copy. Since there may be documents I am not entitled to review it is best not to send them through my office for copying. If you do the copying, please send the originals back to Paul and keep a copy, since he has the remainder of the original file.

There is a status conference in January to set up the evidentiary hearing. I will keep you posted. Mike

Michael J. Hanson
Call and Hanson
413 G Street
Anchorage, AK 99501
(907) 258-8864-phone

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Paul W. Waggoner

From: Mike J. Hanson <MikeJHanson@chklaw.net>
Sent: Thursday, December 21, 2017 9:12 AM
To: Paul W. Waggoner
Subject: RE: Burnett

I am sorry Paul. I doubt Mona will have time to get to the pleadings today. Mike

Michael J. Hanson

Call and Hanson
413 G Street
Anchorage, AK 99501
(907) 258-8864-phone

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From: Paul W. Waggoner [<mailto:pwaggoner@richmondquinn.com>]
Sent: Thursday, December 21, 2017 8:41 AM
To: Mike J. Hanson <MikeJHanson@chklaw.net>
Cc: Anita R. Tardugno <atardugno@richmondquinn.com>
Subject: Burnett

I would like the pleadings we discussed today so I can take them with me to Mexico. Thanks.

Paul W. Waggoner, Attorney
Richmond & Quinn
360 K Street, Suite 200
Anchorage, Alaska 99501
Phone: 907.276.5727
Fax: 907.276.2953
pwaggoner@richmondquinn.com
www.richmondquinn.com

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2353.005

Invoice Recap Subsequent Copy

03/08/2018

Gelco - R4 Hawaii/Alaska Office

Pay To Firm: Law Office of Richmond and Quinn
 360 K Street Suite 200
 Anchorage, AK 99501

Receipt Date: 01/20/2018**Invoice Date:** 01/13/2018**Finalized Date:** 02/05/2018

Invoice Firm ID: 23080
Matter Name: Martinez adv. Burnett
Matter ID: 11815
Invoice ID: 353505
Invoice Sequence: Initial
Claim Number: 0225479670101141
Occurrence Number:

Claim Rep: Montano, Jennifer

Enter any additional information below:

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Fees:	\$4,680.00	Fees To Date:	\$20,514.00
Expenses:	\$116.43	Expenses To Date:	\$118.95
Total (USD):	\$4,796.43	Totals To Date (USD):	\$20,632.95

Expense Code Summary

Expense Code	Expense Amount
LA	4536.00
LC	116.43

	Submitted	Reduction	Payable
Fees			
Further Review			
Potential Paralegal Functions	\$80.00	\$44.00	\$36.00
Guideline Non-Compliant			
Excessive Time Charges	\$60.00	\$40.00	\$20.00
Vague Descriptions	\$80.00	\$60.00	\$0.00
Not At Issue	\$4,480.00	\$0.00	\$4,480.00
Fees Total:	\$4,680.00	\$144.00	\$4,536.00
Fees 100% share:			\$4,536.00
Expenses			
Not At Issue	\$116.43	\$0.00	\$116.43
Expenses Total:	\$116.43	\$0.00	\$116.43
Expenses 100% share:			\$116.43
Grand Total (USD):	\$4,796.43	\$144.00	\$4,652.43
Pay This Amount: (USD):			\$4,652.43
Law Firm Tax ID:			
Tasks Performed From: 11/19/2017 ~ 12/28/2017			

Flagged Line Items

Date	Initial Description	Rate	Time	Amount
Fees				
Further Review				
<u>Potential Paralegal Functions</u>				
12/21/2017	PWW [L110][A107] Email to Hanson re pleadings.	Submitted:	\$200.0000	0.20 \$40.00
		Audited:	\$90.0000	0.20 \$18.00
		Resolution:	\$90.0000	0.20 \$18.00
		Reduction:		\$22.00
External notes for the above line item:				
Note:	Firm failed to respond to the Notification Letter in the time allotted resulting in a waiver.			
12/22/2017	PWW [L110][A107] Draft email to Hanson re production of records.	Submitted:	\$200.0000	0.20 \$40.00
		Audited:	\$90.0000	0.20 \$18.00
		Resolution:	\$90.0000	0.20 \$18.00

C-17

Reduction: \$22.00

Guideline Non-CompliantExcessive Time Charges

GEICO requires that the time entered be the actual time expended on a function, without the time being rounded or standardized.

12/28/2017	PWW	"[L120][A104] Initial analysis of entry of appearance."	Submitted: \$200.0000	0.30	\$60.00
			Audited: \$200.0000	0.10	\$20.00
			Resolution: \$200.0000	0.10	\$20.00
			Reduction:		\$40.00

Vague Descriptions

Generic and general activity descriptors are not acceptable and will not be reimbursed in the absence of further information. Vague descriptor examples include Prepare for, Work on, Communicate with, Discussions with, Review/Draft status etc. Page 6 #5-6

12/20/2017	PWW	"[L120][A101] Prepare and plan for meeting with Robert Martinez."	Submitted: \$200.0000	0.30	\$60.00
			Audited: \$0.0000	0.30	\$0.00
			Resolution: \$0.0000	0.30	\$0.00
			Reduction:		\$60.00

All Line Items

Date	Initial	Description	Rate	Time	Amount
Fees					
11/19/2017	PWW	"[L120][A104] Analyze problems created for the Martinez by the continuing pollution of Burnett's property."	\$200.0000	@ 1.50	\$300.00
11/21/2017	PWW	"[L120][A104] Study Supreme Court decision in Burnett v. Geico."	\$200.0000	@ 1.30	\$260.00
11/21/2017	PWW	"[L120][A106] Discuss with Martinez the developments in the case and the steps I am taking to protect their interests."	\$200.0000	@ 0.50	\$100.00
11/21/2017	PWW	"[L120][A107] Confer with Geico attorney Mike Hanson re protection of Martinez' interests."	\$200.0000	@ 0.20	\$40.00
12/01/2017	PWW	"[L120][A104] Review assumption of duty theories in Prosser."	\$200.0000	@ 1.00	\$200.00
12/01/2017	PWW	"[L120][A107] Discuss with Mike Hanson the mistakes in the current approach of Geico."	\$200.0000	@ 0.30	\$60.00
12/01/2017	PWW	"[L120][A103] Begin drafting arguments in favor of clean up."	\$200.0000	@ 2.50	\$500.00
12/02/2017	PWW	"[L120][A103] Finish first draft of letter to Geico re duty owed to Martinez."	\$200.0000	@ 3.50	\$700.00
12/04/2017	PWW	"[L120][A104] Evaluate mutual mistake of fact issue with regard to pollution notice to state."	\$200.0000	@ 0.50	\$100.00
12/04/2017	PWW	"[L120][A103] Draft letter to Geico re protecting the Martinez interests."	\$200.0000	@ 2.50	\$500.00
12/05/2017	PWW	"[L120][A104] Review assumption of duty cases from Prosser On Torts."	\$200.0000	@ 1.50	\$300.00
12/06/2017	PWW	"[L120][A103] Further work on letter re coverage for damages	\$200.0000	@ 2.50	\$500.00

In excess of limits on Martinez policy."

12/08/2017	PWW	"[L110][A103] Draft email to Mike Hanson re Alsha's file and pleadings filed in the Trial Court."	\$200.0000	@	0.40	\$80.00
12/15/2017	PWW	"[L120][A108] Discuss with Mike Lina how to proceed in this litigation and who is the real party in interest."	\$200.0000	@	0.30	\$60.00
12/18/2017	PWW	"[L120][A104] Review and analyze response letter from Hanson requesting that cleanup be completed."	\$200.0000	@	0.30	\$60.00
12/19/2017	PWW	"[L110][A106] Draft letter to Martinez re Gelco response to cleanup demand."	\$200.0000	@	0.30	\$60.00
12/20/2017	PWW	"[L120][A101] Prepare and plan for meeting with Robert Martinez."	\$200.0000	@	0.30	\$60.00
		Payable:	\$0.0000	@	0.30	\$0.00
12/20/2017	PWW	"[L110][A104] Review and respond to 2 emails from Hanson and Bray re custody of records."	\$200.0000	@	0.20	\$40.00
12/20/2017	PWW	"[L120][A106] Discuss with Robert Martinez re how to proceed."	\$200.0000	@	0.40	\$80.00
12/20/2017	PWW	"[L120][A108] Discuss with Josh Martinez how to proceed in the case and his agreement to have his Dad control case."	\$200.0000	@	0.40	\$80.00
12/21/2017	PWW	"[L110][A107] Email to Hanson re pleadings."	\$200.0000	@	0.20	\$40.00
		Payable:	\$90.0000	@	0.20	\$18.00

External notes for the above line item:

Note: Firm failed to respond to the Notification Letter in the time allotted resulting in a waiver.

12/22/2017	PWW	"[L110][A107] Draft email to Hanson re production of records."	\$200.0000	@	0.20	\$40.00
		Payable:	\$90.0000	@	0.20	\$18.00
12/22/2017	PWW	"[L120][A106] Draft email to client Robert Martinez re reviewing pleading and joining lawsuit."	\$200.0000	@	0.30	\$60.00
12/28/2017	PWW	"[L120][A104] Initial analysis of entry of appearance."	\$200.0000	@	0.30	\$60.00
		Payable:	\$200.0000	@	0.10	\$20.00
12/28/2017	PWW	"[L210][A104] Review and analyze 341 pages of pleadings filed after Martinez dismissal from case."	\$200.0000	@	2.00	\$400.00

Expenses

12/26/2017	XXX	"[E102] Northern Duplicating Inc; Outside printing Gelco pleading file"	\$1.0000	@	116.43	\$116.43
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Timekeeper Summary

Timekeeper Initials	Timekeeper Name	Rate	Hours
PWW	Waggoner, Paul W	\$200.0000	23.40

13

000001022517847010114100250



GEICO General Insurance Company

Attn: Region IV Claims, PO Box 509119
San Diego, CA 92150-9914

01/08/2018

Richmond And Quinn Apc
Mr. Paul Waggoner
380 K St STE 200
Anchorage, AK 99501-2038

RECEIVED

JAN 12 2018

RICHMOND & QUINN

Company Name: Gelco General Insurance Company
Claim Number: 022547967-0101-141
Loss Date: Wednesday, November 23, 2011
Policyholder: Robert Martinez
Driver: Joshua Martinez
Clients: Robert & Joshua Martinez

Dear Mr. Paul Waggoner,

As discussed on 01/05/2018, I am the assigned adjuster to claim number 0225479670101141.

Thank you for your time regarding this matter.

Sincerely,

Jennifer Montano
907-561-8100 x11
Claims Department

For your protection Alaska law requires the following statement to appear on this form: "A person who knowingly and with intent to injure, defraud, or deceive an insurance company files a claim containing false, incomplete, or misleading information may be prosecuted under state law."

 KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or Preempted by *Attorneys Liability Protection Society, Inc. v. Ingaldson Fitzgerald, P.C.*, 9th Cir.(Alaska), Sep. 23, 2016

West's Alaska Statutes Annotated

Title 21. Insurance

Chapter 96. Miscellaneous Provisions

AS § 21.96.100

§ 21.96.100. Appointment of independent counsel; conflicts of interest; settlement

Currentness

(a) If an insurer has a duty to defend an insured under a policy of insurance and a conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured in writing waives the right to independent counsel. An insurance policy may contain a provision that provides a method of selecting independent counsel if the provision complies with this section.

(b) For purposes of this section, the following do not constitute a conflict of interest:

- (1) a claim of punitive damages;
- (2) a claim of damages in excess of the policy limits;
- (3) claims or facts in a civil action for which the insurer denies coverage.

(c) Notwithstanding (b) of this section, if the insurer reserves the insurer's rights on an issue for which coverage is denied, the insurer shall provide independent counsel to the insured as provided under (a) of this section.

(d) If the insured selects independent counsel at the insurer's expense, the insurer may require that the independent counsel have at least four years of experience in civil litigation, including defense experience in the general subject area at issue in the civil action, and malpractice insurance. Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar civil action in the community in which the claim arose or is being defended. In providing independent counsel, the insurer is not responsible for the fees and costs of defending an allegation for which coverage is properly denied and shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage. The independent counsel shall keep detailed records allocating fees and costs accordingly. A dispute between the insurer and insured regarding attorney fees that is not resolved by the insurance policy or this section shall be resolved by arbitration under AS 09.43.

(e) If the insured selects independent counsel at the insurer's expense, the independent counsel and the insured shall consult with the insurer on all matters relating to the civil action and shall disclose to the insurer in a timely manner all information relevant to the civil action, except information that is privileged and relevant to disputed coverage. A

claim of privilege is subject to review in the appropriate court. Information disclosed by the independent counsel or the insured does not waive another party's right to assert privilege.

(f) An insured may waive the right to select independent counsel by signing a statement that reads substantially as follows:

I have been advised of my right to select independent counsel to represent me in this lawsuit and of my right under state law to have all reasonable expenses of an independent counsel paid by my insurer. I have also been advised that the Alaska Supreme Court has ruled that when an insurer defends an insured under a reservation of rights provision in an insurance policy, there are various conflicts of interest that arise between an insurer and an insured. I have considered this matter fully and at this time I am waiving my right to select independent counsel. I have authorized my insurer to select a defense counsel to represent me in this lawsuit.

(g) If an insured selects independent counsel under this section, both the counsel representing the insurer and independent counsel representing the insured shall be allowed to participate in all aspects of the civil action. Counsel for the insurer and insured shall cooperate fully in exchanging information that is consistent with ethical and legal obligations to the insured. Nothing in this section relieves the insured of the duty to cooperate fully with the insurer as required by the terms of the insurance policy.

(h) When an insured is represented by independent counsel, the insurer may settle directly with the plaintiff if the settlement includes all claims based upon the allegations for which the insurer previously reserved its position as to coverage or accepted coverage, regardless of whether the settlement extinguishes all claims against the insured.

Credits

SLA 1995, ch. 62, § 107; SLA 1997, ch. 26, §§ 34, 35. Renumbered from 21.89.100.

Notes of Decisions (4)

AS § 21.96.100, AK ST § 21.96.100

Current through the 2017 First Regular Session through Fourth Special Session of the 30th Legislature

Paul W. Waggoner

From: Paul W. Waggoner
Sent: Sunday, March 11, 2018 8:41 AM
To: jmontano@geico.com
Cc: Judy Francis-Woods
Subject: Supplement to Response to Geico Non-payment of Fees Claim No. 0225479670101141 Burnett v. Geico sent 3/8
Attachments: 20180311082331025.pdf

One of the untrue statements contained in the letter you signed dated 3/8/18 is that Burnett was not making a claim against the Martinez. While preparing other pleadings to be filed with the court in this case I located the admission that I knew Geico had made about the contemporaneous claims that Burnett was making against the Martinez. I have attached page 1 of GEICO'S REPLY TO BURNETT'S OPPOSITION TO MOTION FOR ORDER PRECLUDING FURTHER PARTICIPATION BY FORMER PARTIES JOSHUA MARTINEZ AND ROBERT MARTINEZ, dated 2/20/18, and underlined in red the following sentence: First, he claims the Martinezes are liable to him for any additional contamination resulting from the incident at issue, and so must be parties in or to allow for "[c]omplete relief to all parties." You have a duty to the Martinez as their adjuster and can be subject to a claim for negligence. C.P. rel. M.L. v Allstate Ins. Co., 996 P.2d 1216 (Alaska 2000). I request that you correct this misstatement in your letter, and the other misstatements that I pointed out.

Paul W. Waggoner, Attorney
Richmond & Quinn
360 K Street, Suite 200
Anchorage, Alaska 99501
Phone: 907.276.5727
Fax: 907.276.2953
pwaggoner@richmondquinn.com
www.richmondquinn.com

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-----Original Message-----

From: Paul Waggoner [<mailto:pwaggoner@richmondquinn.com>]
Sent: Sunday, March 11, 2018 8:24 AM
To: Paul W. Waggoner
Subject: Message from "RNP002673B6DA86"

This E-mail was sent from "RNP002673B6DA86" (MP C5503).

Scan Date: 03.11.2018 08:23:30 (-0800)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

CHARLES E. BURNETT,

Plaintiff,

vs.

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Defendants.

RECEIVED

FEB 21 2010

RICHMOND & QUINN

2/20/18

Case No.: 4FA-12-02365 CI

**GEICO'S REPLY TO BURNETT'S OPPOSITION TO MOTION FOR ORDER
PRECLUDING FURTHER PARTICIPATION BY FORMER PARTIES
JOSHUA MARTINEZ AND ROBERT MARTINEZ**

Burnett argues the Martinezes are indispensable parties for two reasons. First, he claims the Martinezes are liable to him for any additional contamination resulting from the incident at issue, and so must be parties in order to allow for "[c]omplete relief to all parties." Opposition, p. 1.

Second, he claims the Martinezes are indispensable as party plaintiffs because GEICO owed them a duty to clean up any contamination resulting

from the incident, even going so far as to proclaim that because of that supposed duty, "it is unnecessary [for this court] to discuss the issue of GEICO's duty to Burnett" - the very issue that the Supreme Court remanded for further proceedings. Opposition, p. 2. Both arguments are legally unsound.

As to the first argument, regardless of the outcome of the issues

DEFENDANT GEICO'S REPLY TO BURNETT'S OPPOSITION RE MOTION TO PRECLUDE
PARTICIPATION BY MARTINEZES
Burnett v GEICO, 4FA-12-02365 CI
Page 1 of 4

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413 G Street

Anchorage, Alaska 99501-2126

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